

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE BANK OF NEW YORK MELLON TRUST  
COMPANY, N.A.,

Plaintiff-Counterclaim Defendant,

-against-

DEPFA BANK PLC and LLOYDS TSB BANK PLC,  
Defendants-Counterclaimants.

Case No.: 10-CV-4424 (JPO) (AJP)

DEPFA BANK PLC and LLOYDS TSB BANK PLC,

Third-Party Plaintiff,

-against-

ACCESS TO LOANS FOR LEARNING  
STUDENT LOAN CORPORATION and  
JPMORGAN CHASE BANK, N.A.

Third-Party Defendants.

**DECLARATION OF JUDITH A.  
ARCHER IN OPPOSITION TO  
MOTION *IN LIMINE* TO  
EXCLUDE CERTAIN EXPERT  
TESTIMONY**

LLOYDS TSB BANK PLC,

Third-Party Plaintiff,

-against-

ACCESS TO LOANS FOR LEARNING  
STUDENT LOAN CORPORATION,

Third-Party Defendant.

JUDITH A. ARCHER declares as follows pursuant to 28 U.S.C. § 1746(2):

1. I am a member of the bar of the State of New York and of this Court. I am a member of the firm of Fulbright & Jaworski, L.L.P., counsel herein for Plaintiff-Counterclaim Defendant The Bank of New York Mellon Trust Company, N.A. ("BNY Mellon"). I submit this declaration in opposition to the Motion *in Limine* of DEPFA Bank plc to Exclude Certain Expert Testimony for the limited purpose of putting documents before the Court.

2. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the deposition of Robert I. Landau dated September 21, 2011.

3. Attached hereto as Exhibit 2 is a true and correct copy of excerpts of the deposition of Jeffrey L. Baliban dated September 29, 2011.

4. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of the deposition of Scott Friedland dated September 19, 2011.

5. Attached hereto as Exhibit 4 is a true and correct copy of excerpts of the deposition of Jack E. Blumenthal dated September 20, 2011.

6. All other documentary exhibits cited in the Memorandum of Law are contained in the Trial Exhibit binders that have been submitted to the Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 14, 2011

  
Judith A. Archer

# EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X  
BANK OF NEW YORK MELLON TRUST  
COMPANY NA,

Plaintiff,

CASE NO. 10-civ-4424 (DLC)

VS.

DEPFA BANK PLC, et al.,

Defendants.

-----X

VIDEOTAPED DEPOSITION

OF

ROBERT I. LANDAU

New York, New York

Wednesday, September 21, 2011

Reported by:

AYLETTE GONZALEZ, CLR

JOB NO. 42105

1 ROBERT I. LANDAU-9/21/11

2 A. I assume so.

3 Q. So, are you here to provide expert  
4 testimony on how the Trust Indenture's term  
5 should be interpreted?

6 MS. ARCHER: Object to the form.

7 A. I am here to testify as to what is  
8 custom and practice in the industry in  
9 understanding the terms of an Indenture. I'm  
10 not here in a legal capacity to indicate how a  
11 judge would decide that interpretation.

12 Q. So, if a term in any of the  
13 Operative Agreements in this matter is  
14 ambiguous, it's not your stated function here  
15 to interpret how that ambiguity should be  
16 resolved?

17 A. No, you're mischaracterizing what I  
18 said, sir.

19 Q. Your answer is no?

20 A. The answer is that I will provide  
21 my opinion as to how the term would be  
22 interpreted by people within the securities  
23 and banking industries.

24 Q. You're not substituting your  
25 opinion for the judge's opinion on how a

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2 contractual term should be interpreted?

3 A. No, I don't know whether the judge  
4 even has an opinion, so I'm certainly not  
5 substituting it.

6 Q. Did you rely on any summaries of  
7 depositions?

8 A. No, I think what I was given were  
9 depositions, page after page, numbered  
10 depositions.

11 Q. Did you read all the depositions?

12 A. I read the ones that I indicated in  
13 my report.

14 Q. Did anybody provide you with a  
15 written summary of what's contained in any of  
16 those depositions?

17 A. No.

18 Q. Have you reviewed the reports of  
19 any other experts in this case?

20 A. Yes.

21 Q. Whose report have you reviewed?

22 A. Mr. Powers, Mr. Thiel, Mr. Pope.

23 Q. With regard to Professor Thiel's  
24 report, do you agree with his conclusions?

25 A. Absolutely not.

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2 to administer the provisions of the contract.

3 That's what they do.

4 Q. So, when you say, "the essential  
5 function," are you using the word "essential"  
6 as an another word for "only"?

7 A. No, because within the four corners  
8 of the Indenture, the Trustee could also be  
9 pointed, for example, as a conversion agent in  
10 a conversion venture issue. So, that's not a  
11 Trustee function. It's a conversion agent  
12 function. But it's tied to being the Trustee.  
13 So, essentially, you -- a synonym would be  
14 primary, I guess, as opposed to only.

15 Q. Given the importance as you say in  
16 your report of "administering the provisions  
17 of an Indenture," is it important for the  
18 Trustee to read and understand the provisions  
19 of an Indenture?

20 A. Yes.

21 Q. Is it important for the Trustee to  
22 determine whether directions from the issuer  
23 are consistent with the provisions of the  
24 Indenture it must administer?

25 MS. ARCHER: Objection to the

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2 form.

3 A. I'm not sure what you mean by the  
4 word "consistent." If you mean consistent as  
5 provided for in the Indenture or which  
6 comports with the requirements set forth in  
7 the Indenture, then the answer is yes.

8 Q. So, to obviate the objection, let  
9 me ask it again. Is it important for the  
10 Trustee to determine whether directions from  
11 the issuer are in accordance with the  
12 provisions of the Indenture in which the  
13 Trustee administers?

14 MS. ARCHER: Same objection.

15 A. Same answer.

16 Q. And that is?

17 A. The one I gave you.

18 Q. So, your answer is that -- let me  
19 ask it again then. Is it important for the  
20 Trustee to determine whether direction from  
21 the Issuer comport with the provisions of the  
22 Indenture it must administer, which I believe  
23 is the word you used?

24 A. Correct.

25 Q. And you think "comport" is



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2 different than "in accordance with"?

3 A. Yes, because the Trustee -- if the  
4 directions it -- strike that.

5 A boilerplate provision of almost  
6 every Indenture will contain a reliance  
7 provision that the Trustee can except/accept  
8 directions given to it by an Issuer, provided  
9 it's in accordance with the provisions of the  
10 Indenture.

11 That means that what it receives is  
12 supposed to be something that it's supposed to  
13 get, and supposed to cover those things which  
14 it's supposed to cover, and that it's  
15 appropriately signed by an authorized officer.  
16 That would be that it comports with what it's  
17 supposed to get.

18 Q. If the Trustee receives a direction  
19 from an Issuer to do something that violates a  
20 requirement of the Indenture, is the Trustee  
21 required to do that for which the Issuer  
22 requests?

23 MS. ARCHER: Object to the form.

24 A. The Trustee should not accept the  
25 direction which -- in which -- in which it

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2 would be required to violate the Indenture  
3 with respect to what it's supposed to get.

4 Q. What do you mean "with respect to  
5 what it's supposed to get"?

6 A. There are three tests to what a  
7 Trustee may accept in terms of direction from  
8 an Issuer, and this is pretty much universally  
9 understood in the industry. And so, what I'm  
10 giving you is custom and practice in the  
11 industry.

12 Number one, that the direction that  
13 it receives is something which it is supposed  
14 to receive pursuant to the terms of the  
15 Indenture. Secondly, what it receives  
16 comports with the requirement of the  
17 Indenture. For example, if the obligor is  
18 required to give a direction to the Trustee  
19 with respect to a conversion rate, then that  
20 certification has to include language with  
21 respect to the conversion rate, not whether  
22 it's correct or not. That's not the Trustee  
23 role, but it's got to contain that.

24 If there's a direction to disburse  
25 funds or to cause a redemption, it's got to

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2 have a language in there the Trustee  
3 understands that's something that is  
4 appropriate for the obligor to direct us to  
5 do. It has that power. That's what I mean by  
6 "comports with the requirements of the  
7 Indenture."

8 The third test is, is it signed by  
9 an appropriate person or an authorized person.

10 Q. Can the Trustee disburse monies  
11 under the Trust at the direction of the Issuer  
12 to a source not permitted under the Trust to  
13 be disbursed to?

14 A. I guess the answer, in general, is  
15 no.

16 Q. Does the Trustee have any  
17 discretion in administering the provisions of  
18 an Indenture Trust?

19 A. Pre-default or post-default?

20 Q. Pre-default.

21 A. The only discretion it has is in  
22 how it complies with the requirement.

23 Q. What do you mean by that?

24 A. Well, there's nothing in the  
25 Indenture that says you've got to keep your

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2 Certificate, and then it may immediately  
3 read -- that is, the individual account  
4 officer, may then read the relevant section of  
5 the Indenture to which that Certificate  
6 pertains to determine whether or not it is  
7 what it's supposed to be.

8 Or, the account officer may be a  
9 very experienced one, very knowledgeable, very  
10 conversant with the requirements and not read  
11 the Indenture.

12 Q. And when you say the account  
13 officer would read the Indenture, you're  
14 referring to the Indenture as well as any of  
15 its supplements; isn't that right?

16 A. Yeah. Let me make a point, sir.  
17 When we use the term, "Indenture," it's always  
18 as supplemented, if supplemented.

19 It's like the president is required  
20 to swear that he will uphold and defend the  
21 Constitution of the United States. It doesn't  
22 say the Constitution of the United States as  
23 amended by amendments 1 through 27. It's the  
24 entire Constitution, including the amendments.

25 So that when the term, "Indenture"

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2       in 2005; is that correct?

3           A.     That's correct.

4           Q.     And the DEPFA Standby Purchase  
5       Agreement was executed in 2005; isn't that  
6       correct?

7           A.     I believe that's correct, yes.

8           Q.     Landau Exhibit 2 and Landau Exhibit  
9       3 references an examination of the Indenture  
10      dated as of August 1, 2005, and Second  
11      Supplemental Indenture; is that correct?

12          A.     Yes. And certainly in the second  
13      paragraph, Landau 2, now, in the first  
14      sentence of the second paragraph, it refers to  
15      the Trust Indenture as well as the second  
16      supplement.

17          Q.     Right. And it does the same thing  
18      in the second paragraph of Landau Exhibit 3,  
19      correct?

20          A.     Well, let's see, second paragraph,  
21      yes, it does.

22          Q.     There's no reference in either of  
23      those paragraphs to the First Supplemental  
24      Indenture there?

25          A.     No, doesn't have to.

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2 Q. Did you ask anyone at Sonnenschein  
3 whether or not their definition of the word,  
4 "Indenture" in Landau 2 and 3 included the  
5 First Supplemental Indenture?

6 A. I did not ask them that, but  
7 that's -- when we talk about a Trust  
8 Indenture, we use the word, "Indenture," it  
9 always means whatever supplements are attached  
10 to it, just like the reference to the  
11 Constitution. Does not have to say "as  
12 amended." Everybody understands that an  
13 Indenture in a transaction means the Indenture  
14 if -- when, as and if it's amended, it  
15 includes all amendments or supplements, I  
16 should say, just as the Constitution is  
17 amended.

18 Q. So, sir, you're interpreting Landau  
19 Exhibit 2 and 3 where it refers to Indenture  
20 to include the First Supplemental Indenture;  
21 isn't that correct?

22 MS. ARCHER: Object to the form.

23 A. I am. I understand what the  
24 reference is because it's a common way in the  
25 industry that Counsel refers to Indentures

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2 that have supplements.

3 Q. Are you an expert on the custom and  
4 practice of Counsel's Opinion Letters in the  
5 bonds industry?

6 MS. ARCHER: Object to the form.

7 A. That relate to Bond Indentures,  
8 yes.

9 Q. So, it's your testimony that  
10 interpreting Landau Exhibit 2 and 3, you look  
11 at the term, "Indenture," which refers to a  
12 specific document, dated as of August 1, 2005,  
13 and is defined as such to believe that also  
14 includes the First Supplemental Indenture?

15 MS. ARCHER: Objection.

16 A. Yes, because the Indenture dated as  
17 of August 2, 2005 will be the same document  
18 with the same date. Regardless of how many  
19 times it's amended, it still would be  
20 characterized with that date.

21 Q. So, are you saying that if there  
22 was a Supplemental Indenture of, say,  
23 August 10, 2005, that when there's a reference  
24 to an Indenture of August 1, 2005, that would  
25 still include the August 10, 2005 Supplemental

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2 Indenture?

3 A. If you're using the word,  
4 "Indenture," subsequent to that date, yes.

5 Q. And, again, sir, there's no  
6 reference in either of these letters to using  
7 any of the definitions set forth in the  
8 Indenture. This is just you interpreting  
9 these letters?

10 MS. ARCHER: Object to the form.  
11 Feel free to go through the letters,  
12 if you need.

13 A. You're miss -- I don't agree with  
14 your conclusion, Counselor. It is my  
15 understanding, having read hundreds and  
16 hundreds of these opinions of Counsel, as to  
17 how they're constructed, what they say, not  
18 precisely word-for-word, but as to what they  
19 say, what they cover, and what is meant when  
20 they refer to an Indenture.

21 And based upon that knowledge in  
22 the industry, I consider myself to be an  
23 expert on what the industry does with respect  
24 to these. This is a very, very common way.

25 Q. Have you seen any evidence, sir, in



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2 this case of Sonnenschein having actually  
3 reviewed the First Supplemental Indenture?

4 A. I don't recall reading any  
5 testimony about any attorney from  
6 Sonnenschein.

7 Q. Have you seen any evidence that the  
8 Trustee ever asked anyone at Sonnenschein  
9 whether they reviewed the First Supplemental  
10 Indenture?

11 MS. ARCHER: Object to the form.

12 A. I don't recall.

13 Q. If Sonnenschein had not reviewed  
14 the First Supplemental Indenture in connection  
15 with issuing these opinions, would it be  
16 inappropriate for the Trustee to refer to  
17 Landau 2 and 3?

18 A. Only if it had actual knowledge  
19 that the law firm did not review it.  
20 Anything -- actual knowledge overrides any  
21 other consideration.

22 Q. That's your legal interpretation?

23 A. No, that's my understanding of how  
24 people in the industry believe the conduct of  
25 the Trustee is governed, based upon years and

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2 years of being involved with the industry and  
3 attorneys in the industry. So, it's an  
4 understanding of industry custom and practice.  
5 It's not a legal opinion.

6 Q. In your report, Exhibit 1,  
7 paragraph 21, you say, "The Trustee properly  
8 relied upon the directions it received to  
9 redeem student loan program revenue bonds."  
10 Do you see that?

11 A. Yes.

12 Q. Was the Trustee permitted to rely  
13 on directions from the Issuer without first  
14 determining such payments were consistent with  
15 the Indenture?

16 MS. ARCHER: Object to the form.

17 A. I don't know what you mean by  
18 "consistent with the Indenture."

19 If, again, this is a direction, it  
20 has to meet the test that I described earlier  
21 this morning in this deposition. If it meets  
22 the requirements of that test, three-part  
23 test, then the Trustee can rely upon it.

24 Q. Can the Trustee rely upon an  
25 opinion by ALL to make a payment into a Swiss

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2 before?

3 A. Yes, I've read it.

4 Q. In addition to today?

5 A. Yes. You asked me questions about  
6 it and, yes, as long as the Trustee had actual  
7 knowledge with respect to these items, then he  
8 might have to take action. Without actual  
9 knowledge, there's nothing in there that it  
10 can do.

11 Q. The word, "amend," can an amendment  
12 consist of solely adding new rights and  
13 obligations rather than changing existing  
14 rights and obligations?

15 A. Under custom and practice in the  
16 industry, an amendment changes.

17 Q. And a change could be the addition  
18 of new rights? That's a change?

19 MS. ARCHER: Object to the form.

20 MR. KHONDKER: Object to the form.

21 A. It would have to -- to amend an  
22 Indenture, number one, there's a requirement.  
23 One has to refer to very specific provisions  
24 of the Indenture. The amendment is not just a  
25 general catchall. It changes existing

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2 that constitutes a change or modification of  
3 the agreement, correct?

4 MS. ARCHER: This object to form.

5 A. I don't have a problem with you  
6 using the words, "amend, modify, supplement,  
7 enhance." All those things can fit in terms  
8 of how -- what the words mean.

9 It's what is intended to be  
10 accomplished by the document, by the  
11 provisions, and it's clear that this -- that  
12 this financing, this financing document  
13 envisions multiple series of bonds. And  
14 that's actually what happened.

15 Q. Is that your legal interpretation  
16 of the document?

17 MS. ARCHER: Object to the form.

18 A. I never gave you a legal  
19 interpretation ever.

20 Q. But you're providing a legal  
21 interpretation of the agreement. You're not  
22 testifying about custom and practice, are you?

23 A. Yes, I am.

24 MS. ARCHER: Object to the form.

25 Go ahead.

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2 A. I'm testifying to the understanding  
3 in the industry as to what these kinds of  
4 provisions mean, and how they're applied and  
5 understood. At the end of the day, the  
6 transaction is there to facilitate someone  
7 borrowing money and to provide some  
8 protections to the people who lend the money.

9 Q. As well as to provide protection to  
10 the bondholders; is that correct?

11 A. The bondholders are normally the  
12 people that provide the money. I mean,  
13 they're the creditors.

14 Q. If you look back, sir, at Section  
15 5.03 of the DEPFA Standby Purchase Agreement,  
16 do you see the phrase, "or permit or suffer to  
17 occur any action or omission which results in  
18 or is equivalent to an amendment, modification  
19 or grant of a waiver under the policy of the  
20 Indenture," et cetera?

21 Do you see that?

22 A. Yes, this isn't.

23 Q. Sir, I haven't asked you a question  
24 yet.

25 A. Oh, I thought you did. Excuse me.

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2 Q. I mean Lloyd's payment terms;  
3 repayment of their bank bonds versus DEPFA  
4 repayment terms. And DEPFA didn't know that,  
5 did they?

6 MS. ARCHER: Object to the form.

7 A. Certainly did not. Certainly did  
8 not. If you say they didn't know. I don't  
9 have any knowledge if they did or didn't know,  
10 so I can't give you an opinion on that.

11 Q. And those payment terms, which I'm  
12 referring to, if the effect of those payment  
13 terms was for DEPFA to receive substantially  
14 less money than it would have received if  
15 there had been no Lloyd's, isn't that a change  
16 to the substantive rights of DEPFA?

17 MS. ARCHER: Object to the form.

18 MR. KHONDKER: Object to the form.

19 A. In my opinion, no, because that was  
20 possible under the provisions of the Indenture  
21 that they agreed to.

22 Q. Even though there was a consent  
23 right for DEPFA, if anything changed their  
24 substantive rights?

25 MS. ARCHER: Object to the form.

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2 MR. KHONDKER: Object to the form.

3 A. And that consent right did not  
4 apply to a subsequent series of senior bonds  
5 under the terms of the Indenture.

6 Q. That's your legal interpretation?

7 A. I'm not giving a legal  
8 interpretation, Mr. Berman. I'm giving you my  
9 common understanding in the industry of what  
10 these terms mean and are understood to cover.

11 Q. If we go back to paragraph 24, you  
12 see --

13 MS. ARCHER: Of his report?

14 Q. Of your report. Thank you.

15 Page 10, third sentence says,  
16 "Although some Issuers and Indenture drafters  
17 use the term, "Supplemental Indenture"  
18 generically, especially on the cover, section  
19 headers and/or provisions will always refer to  
20 amending the Indenture when such or  
21 substantive rights to existing rights,  
22 obligations, responsibilities or liabilities  
23 of the parties to or beneficiaries of the  
24 Indenture provisions?"

25 Do you see that?

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2 will reflect the wishes of the parties to the  
3 transaction.

4 Q. In paragraph 29 of your report, you  
5 give the opinion that you would expect to see,  
6 spelled out explicitly in the Indenture, any  
7 right to consent to the issuance of an  
8 additional series of bonds. Is that opinion  
9 based on your experience?

10 A. Yes.

11 Q. How so?

12 A. Well, I've never seen an Indenture  
13 in which subsequent potential purchasers of  
14 bonds have to pass -- have to be agreed to by  
15 prior purchasers of bonds.

16 In other words, Series A is  
17 issued -- and all this would be spelled out in  
18 the Indenture. Series A is issued, and the  
19 Indenture says that the holders of Series A  
20 bonds shall have the absolute right at any  
21 time, and from time to time, to approve,  
22 disapprove the purchasers of any subsequent  
23 series of bonds, or the issuance of any  
24 subsequent series.

25 In other words, the absolute --



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2 what I would call the absolute veto right.

3 I've never seen that provision because the  
4 underwriters tell me they couldn't sell the  
5 bond issue.

6 Q. So, it would be unusual, in your  
7 experience, for an Issuer to grant that right  
8 to a liquidity provider?

9 A. It would be more than unusual. It  
10 is just highly unlikely that that would  
11 happen.

12 Q. Do you know whether liquidity  
13 providers ask for that right?

14 A. I don't know.

15 Q. Do you know whether DEPFA asked for  
16 that right?

17 MR. BERMAN: Object to the form.

18 A. I don't know.

19 Q. I'm sorry, let me withdraw the  
20 question.

21 Do you know whether DEPFA asked for  
22 the right to consent to the issuance of  
23 additional bonds?

24 A. I'm trying to remember. I don't  
25 think so. I know that DEPFA was a contender

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2 to be the liquidity provider for the so-called  
3 second series. What they -- I don't recall  
4 reading anything as to what provisions they  
5 wanted or insisted upon as a condition of  
6 participation.

7 Q. In how many deals have you seen an  
8 Issuer grant the right to consent to the  
9 issuance of additional bonds to a liquidity  
10 provider?

11 A. None.

12 Q. Do you agree with the idea that  
13 consent of the liquidity provider is required  
14 on an amendment or modification of an  
15 Indenture unless the particular amendment or  
16 modification is carved out as an exception?

17 MR. BERMAN: Object to the form.

18 Q. Do you understand the question?

19 A. No, you lost me. I'm sorry, I  
20 apologize. I can't -- could you rephrase it?

21 Q. Okay. Have you seen consent  
22 provisions in Indentures that have a carveout  
23 saying that Indentures or Standby Liquidity  
24 Agreements that say that have a carveout that  
25 says that consent is not required for the

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2 issuance of additional bonds?

3 A. No, it would never -- based upon my  
4 knowledge of the industry in how this worked,  
5 it would not be -- it would not -- it would  
6 just be the reverse. If the consent has to be  
7 given, it has to be spelled out. It's not the  
8 reverse. Consent is required is what would go  
9 into the Indenture.

10 Q. Please take a look at Chapman 7,  
11 the DEPFA SBPA that we've been discussing  
12 today.

13 Have you reviewed this document in  
14 connection with the preparation of your  
15 report?

16 A. Yes.

17 Q. Where in Chapman 7, if you recall,  
18 does it say that DEPFA's consent is required  
19 for the issuance of additional bonds?

20 MR. BERMAN: Objection.

21 A. Well, let's just say since this is  
22 not supposed to be a memory test, I don't  
23 recall reading that.

24 Q. Do you know whether the Trust  
25 Indenture or the first Supplemental Trust

# EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X  
BANK OF NEW YORK MELLON TRUST  
COMPANY NA,

Plaintiff,

CASE NO. 10-civ-4424 (DLC)

VS.

DEPFA BANK PLC, et al.,

Defendants.

-----X

VIDEOTAPED DEPOSITION

OF

JEFFREY L. BALIBAN

New York, New York

Thursday, September 29, 2011

Reported by:

AYLETTE GONZALEZ, CLR

JOB NO. 42110

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2 MS. ARCHER: Object to the form.

3 A. Can you repeat it?

4 (Whereupon, the referred to  
5 question was read back by the  
6 Reporter.)

7 A. Yes, I think there's some  
8 confusion.

9 Q. In your report, do you take any  
10 position as to how that ambiguity should be  
11 resolved?

12 A. I don't.

13 Q. Is that outside the scope of your  
14 engagement?

15 A. It is.

16 Q. Is it outside the scope of your  
17 engagement to opine upon whether the  
18 redemption schedules in Section 3.02 of the  
19 SBPAs apply to loan account funds?

20 A. The scope of my work was to review  
21 the reports of Mr. Friedland and  
22 Mr. Blumenthal and provide rebuttal where I  
23 believe necessary on their methodologies and  
24 findings.

25 So, to the extent that their

1 JEFFREY L. BALIBAN-9/29/11

2 methodologies and findings make certain  
3 assumptions, I reviewed the same agreements I  
4 think that they did, or that they said they  
5 did, and where I believe there was ambiguity  
6 and they didn't, I pointed out that issue.

7 Q. Okay.

8 But are you offering an opinion as  
9 to how the Court should resolve any ambiguity  
10 in the contracts as to how or when to use loan  
11 account funds for bank bond redemptions?

12 A. At this time, no.

13 Q. And if there's an ambiguity in the  
14 documents, does that mean that there's more  
15 than one reasonable interpretation?

16 A. It could.

17 Q. And could one of those reasonable  
18 interpretations be that both revenue and loan  
19 account funds are subject to the redemption  
20 schedules in the SBPAs?

21 MS. ARCHER: Object to the form.

22 A. Perhaps.

23 MR. BARRES: I'm handing the  
24 witness a document previously marked  
25 Chapman Exhibit 8.

1 JEFFREY L. BALIBAN-9/29/11

2 reasonable minds could differ on how much  
3 should be accrued by the individual making the  
4 decision contemporaneously with issues  
5 arising. And that not every person would  
6 accrue the exact same amount.

7 And so, if you're going to make a  
8 calculation of how much is owed in a damages  
9 sense by one party to another, it's got to  
10 presuppose that the decisions that were made  
11 were somehow incorrect or wrong.

12 Q. Well, is an expert required to copy  
13 the contemporary activities of a trust  
14 administrator when he believes they are wrong?

15 MS. ARCHER: Object to the form.

16 A. I think an expert is required to  
17 give due consideration in a matter like this  
18 to what was done by the parties at the time  
19 contemporaneously with the issues arising,  
20 even if he disagrees with the amounts that  
21 they used.

22 Unless, in his or her opinion, he  
23 believes that the decisions that were made  
24 were made without due professional care or  
25 made incorrectly, improperly, irresponsibly or



1 JEFFREY L. BALIBAN-9/29/11

2 in an imprudent matter.

3 Q. Would you agree an expert is not  
4 required to copy the contemporary activities  
5 of a trust administrator when they are wrong?

6 MS. ARCHER: Object to the form.

7 A. When they are wrong is a difficult  
8 aspect of your question. When you say "when  
9 they are wrong," do you mean if I were to  
10 think that a lower or a higher amount of an  
11 accrual would have been more correct, that  
12 doesn't necessarily mean that what was  
13 actually accrued was wrong. I may just think  
14 it's less correct.

15 But if I think that it was  
16 irresponsible or imprudent or certainly did  
17 not reflect professional due care in their  
18 work, and I reached that opinion, then I would  
19 think there would be, certainly, a correct way  
20 to. You know, I would come up with my own  
21 opinion of what I think should have been  
22 accrued.

23 Q. So, when the damages expert  
24 reasonably believes that the trust  
25 administrator did something wrong at the time,

1 JEFFREY L. BALIBAN-9/29/11

2 then it is all right for the damages expert to  
3 make a different assumption from the trust  
4 administrator?

5 MS. ARCHER: Object to the form.

6 A. A damages expert can make whatever  
7 assumption he or she wants. And if I'm  
8 retained and am asked -- regardless of what  
9 was done at the time, I want you to  
10 reconstruct this and tell me what you think  
11 should have been done. I can do that and I  
12 might come up with a different response than  
13 what was originally done.

14 But if I'm going to go into -- then  
15 go into calculations to say, and as a result  
16 of my work, party A owes money to party B or  
17 party B is owed money by party -- by some  
18 other party, that's a whole different thing.

19 Then I have to look at whether or  
20 not there is -- there was some, you know, duty  
21 to apply due professional care or whether  
22 there was decisions made by the by the  
23 individual who originally made them were  
24 somehow inappropriate beyond just the fact  
25 that the dollar amount may disagree with mine.

1 JEFFREY L. BALIBAN-9/29/11

2 A. It would depend on the assumption  
3 that you're changing. I think he agreed that  
4 if you changed certain assumptions  
5 underpinning his analysis, that the numbers  
6 may change significantly, insignificantly,  
7 would depend on the assumption. I'm just  
8 saying the same thing.

9 Q. In paragraph 14 of your report --

10 A. Okay.

11 Q. You write that BNY Mellon has  
12 retained Navigant in this matter to "Review  
13 Mr. Friedland and Mr. Blumenthal's report and  
14 provide, where we believe necessary,  
15 appropriate rebuttal to the opinions in the  
16 two experts' reports.

17 In so doing, we analyze the key  
18 assumptions and methodologies in light of the  
19 terms and conditions in the Trust Indenture,  
20 First and Second Supplemental Indenture, SBPAs  
21 and/or other pertinent agreements."

22 Is that correct?

23 A. That's correct.

24 Q. Do you have an opinion as to  
25 whether any of Mr. Friedland's key assumptions

1           JEFFREY L. BALIBAN-9/29/11

2   and methodologies were consistent or  
3   inconsistent with the terms and conditions of  
4   the various contracts that you read?

5           MS. ARCHER: Object to the form.

6           A. Well, I think that -- I think that  
7   Mr. Friedland does assume the one pot of money  
8   kind of theory. And unlike Mr. Blumenthal,  
9   who also assumes the one pot of money, but  
10   gives a second scenario assuming that the  
11   Court ultimately finds that's not the case,  
12   based on his recognition of the fact that  
13   there is ambiguity. I note that Mr. Friedland  
14   hasn't made -- hasn't made that. So, in  
15   preparing his analysis, he assumed the one pot  
16   of money.

17           In reading the agreements, just as  
18   a financial person, I find that there is  
19   inconsistent see or uncertainty or confusion  
20   and would and there is nothing that  
21   Mr. Friedland said in his report or his  
22   deposition that convinced me that there was no  
23   confusion or inconsistently.

24           And so by doing his calculations in  
25   accordance with one specific interpretation,

1                   JEFFREY L. BALIBAN-9/29/11

2       that may or may not be consistent with the  
3       documents.

4               Q.     It may or may not be consistent  
5       with the documents?

6               A.     Yes, if the Court were to come down  
7       and say this is one pot of money and should be  
8       treated as such.

9               Q.     Isn't that true of anything?

10              A.     Then I think that's consistent.

11              Q.     Do you agree that it is or isn't  
12       consistent with the documents?

13                   MS. ARCHER:  Object to the form.  
14               That was a phrase you built into your  
15       question.

16              A.     No, I'm saying -- you're asking me  
17       whether what he's done is consistent or  
18       inconsistent with the documents what he's done  
19       is consistent with one interpretation of the  
20       documents, and absent the Court coming and  
21       instructing us how they're to be interpreted,  
22       my reading of it, my lay reading of it, shows  
23       there's other interpretations.  And to the  
24       extent that those other interpretations are  
25       correct, then what he's done is not consistent

1 JEFFREY L. BALIBAN-9/29/11

2 to amounts to be set aside pursuant to the  
3 waterfall for bond interest payments to the  
4 Department of Education perhaps other things;  
5 is that correct?

6 A. The report says what it says.

7 Q. Do you believe that Mr. Friedland  
8 supplanted management's judgment -- do you  
9 believe that Mr. Friedland supplanted ALL's  
10 realtime judgment with his own espoused view  
11 with the timing and amounts of approvals that  
12 should have been made?

13 A. So, your question is, do I -- am  
14 I -- do I believe Mr. Friedland's calculation  
15 supplants ALL's realtime judgment using his X  
16 paused view yes that's my judgment.

17 Q. And are you opining that  
18 management's judgment realtime judgment as to  
19 the amounts to set aside and the timing of  
20 accruals should be given some deference?

21 A. Define deference for me, if you  
22 would. What do you mean by that?

23 Q. Well, let me see if I can remember  
24 your words. Do you believe that management's  
25 realtime judgment as to the timing and amount

1 JEFFREY L. BALIBAN-9/29/11

2 of set asides or items under the waterfall  
3 should not be -- well, should not be disturbed  
4 unless there has been a failure of due care,  
5 professional responsibility or imprudence?

6 MS. ARCHER: Object to the form.

7 A. I certainly feel that management's  
8 or ALL's realtime judgment needs to be  
9 considered strongly before statements such as  
10 there was sufficient money to redeem bonds or  
11 money that should have been used for bond  
12 redemption or any other characterization of  
13 where that money should have gone when that  
14 opinion conflicts with what ALL had done in  
15 the circumstances.

16 So, if ALL were to say or, I'm  
17 sorry, if Mr. Friedland were to say on this  
18 particular day, there's \$24,387,469.15 that's  
19 available for redemption and ALL, in their  
20 realtime judgment, didn't use that money for  
21 redemption. Unless you can show that they  
22 were unreasonable in making -- in reaching  
23 that conclusion or acted imprudently, then  
24 before you say that money is available for  
25 redemption, you have to understand the basis

1 JEFFREY L. BALIBAN-9/29/11

2 of why redemptions were not made and what  
3 might have been going through Martha  
4 Peterson's, or anyone else at ALL's, mind when  
5 they reached the conclusion that  
6 redemptions -- that money should not be used  
7 for redemption before you can say it should  
8 have been.

9 Q. Can you tell me what area of  
10 scientific, technical or other specialized  
11 knowledge you're drawing upon when you opine  
12 that management realtime judgment needs to be  
13 considered strongly before statements such as  
14 there was sufficient money to redeem bonds or  
15 money that should have been used for bond  
16 redemption or any other characterization of  
17 where that money should have gone when that  
18 opinion conflicts with what ALL had done in  
19 the circumstances?

20 MS. ARCHER: Object to the form.

21 A. I'm saying the hypothesis isn't  
22 specifically specified. There's variables  
23 that drive the decisions made that, obviously,  
24 haven't been considered and may, in fact, be  
25 important.



1 JEFFREY L. BALIBAN-9/29/11

2 Q. I asked you what area of  
3 scientific, technical or other specialized  
4 knowledge you're drawing upon when you gave --  
5 I'm not going to repeat it again. The answer  
6 that you gave two answers ago.

7 MS. ARCHER: Objection; asked and  
8 answered.

9 Q. Were you announcing an accounting  
10 principal? Were you announcing a forensic  
11 accounting principal, a principal trust  
12 administration?

13 Please tell me what area of  
14 scientific or technical knowledge you are  
15 drawing upon when you gave that answer?

16 MS. ARCHER: Same objection.

17 A. I'm drawing upon the application of  
18 the scientific method as is generally  
19 understood to economic, financial and  
20 accounting decisions. Since in this case,  
21 you're dealing with something that is, in  
22 effect, an economic financial or accounting  
23 decision whether or not certain amounts should  
24 be used for this versus that.

25 And before you reach a conclusion

1 JEFFREY L. BALIBAN-9/29/11

2 that based on the evidence you see or that  
3 you've considered at least there are amounts  
4 of money that could have been used for purpose  
5 A, although you see it has not been used for  
6 purpose A, an economist will look at that and  
7 say that either there was another reason, when  
8 there was no other reason.

9 So, before you draw that  
10 conclusion, you have to determine whether  
11 there was another reason whether or not  
12 another variable has to be considered in  
13 making your forecast of amounts that would be  
14 available under accounting rules or under  
15 financial economic theory to be available to  
16 be used to pay for bond redemption. And if he  
17 hasn't considered -- there's certain variables  
18 he hasn't considered, then I don't see how  
19 his -- his calculation could only be correct  
20 coincidentally.

21 Q. So, your statement that the  
22 realtime judgment of management should be  
23 strongly considered, that's principal of  
24 economics?

25 MS. ARCHER: Objection; asked and

1 JEFFREY L. BALIBAN-9/29/11

2 Unless I fit -- unless I understand what that  
3 is -- if I could know what that is it and then  
4 dismiss it and say, well, it's not an  
5 appropriate reason, then I might be able to  
6 draw a conclusion.

7 But without making the inquiry,  
8 without knowing what it is, drawing a  
9 conclusion, an economic conclusion or  
10 mathematical conclusion, is premature.

11 Q. Are you opining that ALL -- that  
12 ALL's management practices with respect to  
13 set-asides or redemptions in this case did  
14 conform to the applicable standard of  
15 professional care for a Trust administrator?

16 MS. ARCHER: Objection.

17 A. I'm -- I'll take the same position  
18 I think that Mr. Friedland and Mr. Blumenthal  
19 take, and that is, I'm not reaching a  
20 conclusion on that and I have not seen  
21 anything that leads me to believe -- leads me  
22 to reach a conclusion one way or the other.

23 I mean, it's certainly outside of  
24 the scope of what I was asked to do. I was  
25 not asked to opine on ALL's behavior.

1 JEFFREY L. BALIBAN-9/29/11

2 administrator was -- what was in their  
3 consideration at the time. And that's not to  
4 say that their consideration is right wrong or  
5 indifferent. It just depends on what they  
6 were thinking at the time. And for me or  
7 anyone else to come back on an espouse basis  
8 and say, well, gee, I subtract out these  
9 required transfers and there's money left,  
10 therefore, that should have been used to  
11 redeem bonds, there could be a very good  
12 reason why that money was not used to redeem  
13 bonds, and that it was in the best interest --  
14 turns out to be in the best interest of the  
15 Trust and in DEPFA and/or Lloyds that it  
16 wasn't used to make those redemptions. I  
17 don't know what they were and I wasn't asked  
18 to figure that out. I'm just saying until you  
19 -- until you analyze that and make a  
20 determination as to what that could be, you  
21 really can't say how much is available for  
22 redemptions?

23 Q. What's -- what, sir, are you doing  
24 other than -- what are you doing to assist the  
25 trier of fact in this case?

1 JEFFREY L. BALIBAN-9/29/11

2 MS. ARCHER: Objection.

3 Q. Determine any dispute at issue and  
4 specifically the dispute at issue whether  
5 redemptions should or should not have been  
6 made in any amount on at least some of the  
7 dates on Friedland Exhibit C?

8 MS. ARCHER: Objection.

9 A. I'm assisting the trier of fact  
10 understand what the potential limitations are  
11 or rebuttals are that Mr. Friedland and/or  
12 Mr. Blumenthal had said.

13 In particular with Mr. Friedland he  
14 said there's money available for redemptions  
15 on all of these dates. That may or may not be  
16 a true statement. That's my rebuttal.

17 Nor does he say -- it could be that  
18 he's saying there's money available for  
19 redemptions and you should redeem four bonds  
20 on each of those dates which for the first  
21 four, five months is a de minimus amount and  
22 is immaterial. And I don't know that I'd take  
23 much issue with it.

24 Q. How are you assisting the trier of  
25 fact by saying that Mr. Friedland's opinion

1 JEFFREY L. BALIBAN-9/29/11

2 may or may not be correct?

3 MS. ARCHER: Objection.

4 A. I'm saying that there are aspects  
5 that I believe Mr. Peterson should have  
6 considered -- I'm sorry, Mr. Friedland -- all  
7 these names. That I believe Mr. Friedland  
8 should have considered before making the  
9 statement that funds are available for  
10 redemption.

11 And I'm further observing that  
12 there's limited value to the statement that  
13 funds are available for redemption unless  
14 you're going to offer some opinion as to how  
15 much of those funds are available for  
16 redemption.

17 If you have 4 million in the  
18 account and you're offering the opinion that a  
19 hundred thousand of it is available for  
20 redemption, that's fine. That's different  
21 from saying 22 million of 249 million is  
22 available for redemption or all of the whole  
23 24 million or half of it.

24 To say that funds are available for  
25 redemption in and of itself without an amount

1 JEFFREY L. BALIBAN-9/29/11

2 is of limited value. And even without that,  
3 unless an expert does the requisite analysis  
4 to make certain that there's not any other  
5 reason why funds were not used to make  
6 redemptions, they can't necessarily draw that  
7 conclusion.

8 Q. But you don't know what any of  
9 those other reasons are?

10 MS. ARCHER: Objection; asked and  
11 answered.

12 A. Again, I wasn't asked to determine  
13 what those reasons are. I can look at the --  
14 I can make my own observations as to what was  
15 going on at time and what -- what Martha  
16 Peterson was facing in terms of redemptions --  
17 you know, sitting there in May, redemptions  
18 coming up later in the month, two, three  
19 months from then, further on down the line in  
20 amounts that were enormous compared to what  
21 was being carried on even both the revenue and  
22 the loan account and -- but -- but what I was  
23 asked to do is offer an opinion on what  
24 Mr. Friedland is saying.

25 And my opinion on what

1 JEFFREY L. BALIBAN-9/29/11

2 redemption, and as a result does not make a  
3 fair redemption, has the Trust administrator  
4 act in a professionally responsible manner  
5 with due care and prudently?

6 MS. ARCHER: Objection.

7 A. I don't know. I haven't -- I  
8 haven't really considered that. So, I really  
9 wouldn't be able to say.

10 Q. And are you opining that setting  
11 aside six months of bond interest at all times  
12 was a reasonable practice if that, indeed, was  
13 the practice?

14 A. I am not opining that it was or was  
15 not reasonable.

16 Q. And you're not opining that setting  
17 bond interests on a -- or setting aside for  
18 bond interests on a period to date basis would  
19 be reasonable one way or the other?

20 A. That's right, I'm not.

21 Q. And in paragraph 44 of your report,  
22 in summarizing Mr. Friedland's analysis, you  
23 refer it -- you use the phrase, "claimed  
24 redemption dates" for May 11, 2008 through  
25 November 29, 2009. And by using the



# EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X  
BANK OF NEW YORK MELLON TRUST  
COMPANY NA,

Plaintiff,

vs.

Civil Action No.  
10 Civ 4424 (DLC)

DEPFA BANK PLC, et al.,

Defendants.

-----X

VIDEOTAPED DEPOSITION OF SCOTT FRIEDLAND

New York, New York

September 19, 2011

Reported by:

KATHY S. KLEPFER, RMR, RPR, CRR, CLR

JOB NO. 42103

1 S. Friedland

2 certificate and second is my knowledge of  
3 Section 148.

4 Q. Independent of this case?

5 A. Independent of this case.

6 Q. Okay. Please look at the bottom of  
7 page 1 of your report. Near the bottom of the  
8 page, it says you have been involved in  
9 investigations of securitizations of student  
10 loans and the loan originator. Do you see that?  
11 It's in Romanette iii.

12 A. Yes.

13 Q. How many of those types of  
14 investigations?

15 A. It was one investigation, but there  
16 were seven securitizations, I believe seven.

17 Q. Did you work on this investigation at  
18 FTI?

19 A. Yes, sir.

20 Q. What kind of investigation was this?

21 A. An internal investigation.

22 Q. What was your role?

23 A. I -- as I guess senior managing  
24 director on the matter, on the investigation.

25 Q. Why was there a need for an internal

1 S. Friedland

2 investigation?

3 A. I think it originated from  
4 discrepancies found during the audit.

5 Q. Were the student loans that you  
6 investigated in this engagement, were those held  
7 in a trust?

8 A. Yes.

9 Q. Were bonds issued to investors?

10 A. In some of the trusts, yes.

11 Q. How many of the trusts?

12 A. I believe six of the seven.

13 Q. And how many investors were --

14 A. You know what, it may have been -- I  
15 don't know if you're making a distinction  
16 between bonds and notes. They may have been  
17 notes as opposed to bonds.

18 Q. For each of the trusts?

19 A. For six of the seven, yes.

20 Q. They were notes instead of bonds?

21 A. That's right.

22 Q. Okay. How many investors were issued  
23 notes in each trust?

24 A. I do not know.

25 Q. More than five?

1 S. Friedland

2 A. Most likely.

3 Q. For each trust?

4 A. I believe so.

5 Q. Okay. How many series of notes?

6 A. I don't recall.

7 Q. What government -- I'm sorry, what  
8 document governed the repayment of the bonds  
9 issued by these trusts -- or, the notes? I'm  
10 sorry.

11 A. There were indentures for each of the  
12 trusts.

13 Q. Was there a waterfall in place to pay  
14 the costs associated with the trust?

15 A. Yes.

16 Q. And to repay bondholders?

17 A. Or noteholders, yes.

18 Q. Okay. Did you analyze whether  
19 redemptions could be made?

20 A. I believe that was part of our  
21 analysis, yes.

22 Q. What was your -- what was your  
23 analysis designed to accomplish?

24 A. The correct reporting for the  
25 transactions of these -- of the -- primarily of

1 S. Friedland

2 the company, the --

3 Q. There was a concern that the reporting  
4 had been inaccurate?

5 A. Yes.

6 Q. In what regard?

7 A. The -- there was a variety of issues.  
8 There was a concern of fraud; there was concern  
9 of theft of funds; there was a concern of  
10 inappropriate use of the collateral in the  
11 different trusts.

12 Q. And did these concerns affect how  
13 redemptions were made?

14 A. Yes.

15 Q. In what way?

16 A. They would impact the availability of  
17 funds for redemptions.

18 Q. Meaning that there would be more funds  
19 available or less funds available?

20 A. Less.

21 Q. And how were -- how did the trustee  
22 for the trust know how to make redemptions?

23 MR. FOURMAUX: Objection.

24 Q. Was there a document that governed or  
25 guided the trustee in terms of how redemptions

1 S. Friedland

2 were made?

3 A. Yes.

4 Q. And what was that?

5 A. The indenture.

6 Q. For each of the trusts?

7 A. That's right.

8 Q. Okay. Did you analyze how to pay  
9 expenses from the trust under each of the  
10 indentures?

11 A. It was part of the analysis, yes.

12 Q. And how to pay interest to bondholders  
13 or noteholders?

14 A. Same answer, yes.

15 Q. Did you analyze how to make accruals  
16 according to the indenture documents?

17 A. Accruals were required, the analysis  
18 included accruals, but I don't think an analysis  
19 was necessary to figure out how to do the  
20 accruals.

21 Q. Were the accruals different for each  
22 of the trusts?

23 A. I don't think so.

24 Q. Please look at the top of page 2 of  
25 Friedland 1. When you say, "I have performed

1 S. Friedland

2 Q. Okay. Do you know whether bonds or  
3 notes were issued?

4 A. I don't recall. I presume if there  
5 were bonds issued, there would have been a trust  
6 involved.

7 Q. Were you asked to do any analysis  
8 concerning bonds or notes for this engagement?

9 A. No.

10 Q. Were you asked to do an analysis of an  
11 indenture or the waterfall within an indenture  
12 for this engagement?

13 A. No.

14 Q. Were you asked to analyze how  
15 redemptions could be made --

16 A. No.

17 Q. -- for this engagement?

18 What about accruals or interest  
19 payments to bondholders?

20 A. Same answer. No.

21 Q. Okay. If I refer to standby bond  
22 purchases agreements as SBPAs, will you know  
23 what I'm referring to?

24 A. Yes.

25 Q. Have you worked on any deals involving



1 S. Friedland

2 Q. Who asked you to do that?

3 A. Counsel.

4 Q. Okay. Why?

5 A. My understanding is, subsequent to  
6 November 29, 2009, that there were -- there were  
7 agreements amongst the parties not to have any  
8 more redemptions.

9 Q. Does your report indicate what  
10 damages, if any, the banks suffered?

11 A. No, sir.

12 Q. Does your report show what payments  
13 should have been made to Lloyds or DEPFA?

14 A. No, sir.

15 Q. Please turn to page 1 of Exhibit C.  
16 May 11, 2008 is the first date you analyze?

17 A. Yes, sir.

18 Q. And why did you select that date?

19 A. Because that is, according to the  
20 schedule of liquidity payments -- I'm not sure  
21 if I'm using the right term, but I think you  
22 know what I mean -- according to the schedule of  
23 payments made by the liquidity providers and by  
24 the terms of the standby bond purchase agreement  
25 for Lloyds, this is the first date possible for

1 S. Friedland

2 counsel to examine records of the trust's  
3 accounts and expenses, to apply the indenture  
4 waterfall on each of the mandatory redemption  
5 dates in the period May 11, 2008 through  
6 November 29, 2009, and determine whether there  
7 were sufficient funds to meet the higher  
8 priority expenses and still redeem bonds on  
9 those dates." Is that a correct explanation of  
10 what you were asked to do?

11 A. Yes.

12 Q. Were you at any time asked to opine on  
13 any other topic?

14 A. No.

15 Q. Do you intend to offer any opinion on  
16 economic damages?

17 A. I have not been asked to do that.

18 Q. And you don't intend to, correct?

19 A. Not unless I'm asked to.

20 Q. Do you intend to express an opinion as  
21 to whether DEPFA has suffered any damages?

22 A. The same answer.

23 Q. You haven't been asked to?

24 A. And -- right.

25 Q. Same question with respect to Lloyds,

1 S. Friedland

2 A. So I don't have an opinion one way or  
3 the other.

4 Q. Would that have been an appropriate  
5 exercise of judgment for ALL to make a  
6 determination as to what its accrual should be  
7 being in that position?

8 A. Again, I have not considered this  
9 question and I do not have an opinion on it.

10 Q. Now, given that a portion of the  
11 period was during some tough economic times,  
12 would it have been justified, would ALL have  
13 been justified in being more conservative in its  
14 accruals?

15 MR. KHONDKER: Objection to form.

16 MR. FOURMAUX: Objection.

17 Q. For example, in 2008 and 2009.

18 A. I think it was required to follow the  
19 indenture consistently.

20 Q. Does the indenture specify exactly how  
21 interest is to be accrued?

22 A. In my mind, it does.

23 Q. It's -- it's absolutely clear in your  
24 mind, no ambiguity?

25 A. I think the application of the

1 S. Friedland

2 Q. Okay. If that were the case, would it  
3 be reasonable for an issuer to determine a --  
4 or, to decide on a conservative method of  
5 setting aside funds for the interest payments?

6 MR. KHONDKER: Objection to form.

7 A. Well, I believe they're tied to what  
8 the indenture states. If "conservative" means  
9 making a judgment that is still within what's  
10 allowable under the indenture -- well, first of  
11 all, you know, I wasn't asked to make -- have an  
12 opinion as to what reasonable judgments are  
13 for -- for -- for ALL to have made. So I don't  
14 have an opinion one way or the other. I was  
15 just stating that, generally speaking, one has  
16 to follow the indenture.

17 Q. So you don't have an opinion one way  
18 or the other if -- if inability to pay interest  
19 payments was an event of default, if that would  
20 justify a more conservative method under the  
21 indenture?

22 A. That's right. I think the indenture  
23 was written to balance between making funds  
24 available and avoiding default, and I don't  
25 think one has to add more to what the indenture

1 S. Friedland

2 Q. Did you form any opinions about the --  
3 the net numbers, principal owed, interest owed  
4 and total owed in any of the tables on page 16  
5 through 18 of Mr. Blumenthal's report?

6 A. No, I was not asked to, and I think we  
7 discussed before I did not attempt to do any  
8 damages analysis. So I have no opinion one way  
9 or the other.

10 MS. ARCHER: Can we mark as Friedland  
11 Exhibit 4 the rebuttal report of Jeffrey L.  
12 Baliban dated August 31, 2011.

13 (Friedland Exhibit 4, Rebuttal Report  
14 of Jeffrey L. Baliban, August 31, 2011,  
15 marked for identification, as of this date.)

16 BY MS. ARCHER:

17 Q. Did you review Mr. Baliban's report,  
18 Mr. Friedland?

19 A. I have.

20 Q. Have you been asked to prepare a  
21 rebuttal or any supplement to your report to  
22 redress -- to address his opinions?

23 A. I have not.

24 Q. Do you intend to?

25 A. Only if I'm asked to.

# EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X  
BANK OF NEW YORK MELLON TRUST  
COMPANY NA,

Plaintiff,

CASE NO. 10-civ-4424 (DLC)

VS.

DEPFA BANK PLC, et al.,

Defendants.

-----X

VIDEOTAPED DEPOSITION

OF

JACK E. BLUMENTHAL

New York, New York

Tuesday, September 20, 2011

Reported by:  
AYLETTE GONZALEZ, CLR  
JOB NO. 42104

1 JACK E. BLUMENTHAL-9/20/11

2 A. Okay.

3 Q. Now, Mr. Fourmaux referred you to  
4 page 3 of your report earlier today.

5 A. Which one?

6 Q. The initial report.

7 A. I mean which Mr. Fourmaux. No,  
8 number 3, the first report?

9 Q. Yes. Specifically the paragraph  
10 under "Overview Of Economic Loss Calculation"?

11 A. Yes.

12 Q. You read that paragraph into the  
13 record?

14 A. Yes.

15 Q. Were you asked to opine on any  
16 other topic than what's expressed in that  
17 first paragraph?

18 A. No.

19 Q. And that --

20 A. Excuse me. When you say the first  
21 paragraph, you really mean that section called  
22 "Overview Of Economic Loss Calculation"?

23 Q. Yes.

24 A. The answer is no. This is all  
25 we've been asked to opine on.



1 JACK E. BLUMENTHAL-9/20/11

2 Q. Okay. Now, do you intend to  
3 express an opinion as to the liability or  
4 fault of ALL in this case?

5 A. Not that I'm aware of at this time.

6 Q. You haven't been asked to express  
7 such an opinion?

8 A. That's correct.

9 Q. Do you intend to express an opinion  
10 as to liabilities or fault of the trustee in  
11 this case?

12 A. Not at this time.

13 Q. And you haven't been asked to?

14 A. That's correct.

15 Q. Do you intend to express any  
16 opinion as to whether ALL breached the  
17 Indenture or any other transaction document?

18 A. I don't believe so.

19 Q. You haven't been asked to express  
20 such an opinion?

21 A. That's correct, at this time.

22 Q. If you were asked to express an  
23 opinion as to whether ALL breached the  
24 Indenture, would you have to do other work to  
25 develop such an opinion?

1 JACK E. BLUMENTHAL-9/20/11

2 A. Yes.

3 Q. What would that consist of, as you  
4 sit here today?

5 A. Well, I don't even know. When you  
6 say, if I were to asked to do that, I don't  
7 know if I could even do it. It depends. When  
8 you talk about breaching an agreement, you're  
9 talking about a lot of legal issues, and I'm  
10 not a lawyer. And I'm not licensed to  
11 practice law, nor do I practice law.

12 So, it would depend on what I were  
13 asked to do, and I haven't given any thought  
14 to that.

15 Q. Okay.

16 A. Nor was I asked to consider it or  
17 anything else. I just simply haven't thought  
18 about it at all.

19 Q. Were you asked to express any  
20 opinion as to whether the trustee breached the  
21 Indenture or any other bond document?

22 A. Was I asked whether --

23 Q. To express an opinion as to whether  
24 the trustee breached the Indenture of any of  
25 the other bond documents?

1 JACK E. BLUMENTHAL-9/20/11

2 A. No, I wasn't asked to do that.

3 Q. And you don't intend to express any  
4 such opinion as you sit there today?

5 A. I have no intention at this time,  
6 correct.

7 Q. Have you been asked to express any  
8 opinion as to whether ALL breached a duty to  
9 Lloyds or DEPFA?

10 A. No.

11 Q. As you sit here today, you don't  
12 intend to express such an opinion?

13 A. I don't.

14 Q. Same question with respect to the  
15 trustee; have you been asked to express such  
16 an opinion as to whether the trustee breached  
17 any such duty to Lloyds or DEPFA?

18 A. No.

19 Q. Do you intend to express any such  
20 opinion, as you sit here today?

21 A. I have no -- I'm not aware of any  
22 plan to change it.

23 Q. Okay.

24 Do you -- have you been asked to  
25 express any opinion as to the scope of the

1 JACK E. BLUMENTHAL-9/20/11

2 trustee's duties to DEPFA and Lloyds?

3 A. No.

4 Q. With respect to any of the matters  
5 that we've just discussed, whether there's  
6 liability or fault on the part of ALL or the  
7 trustee, whether there were breaches of the  
8 Indenture or duty by ALL or the trustee to  
9 Lloyds or DEPFA, do you, as you sit here  
10 today, have any opinions on those topics?

11 A. No.

12 Q. Do you have an opinion as to  
13 whether ALL acted negligently in its  
14 performance of its duties as a program  
15 administrator?

16 A. Do I have an opinion?

17 Q. Yes.

18 A. To express?

19 Q. Yes.

20 A. With respect to that?

21 Q. Yes.

22 A. No.

23 Q. Do you have an opinion as to  
24 whether ALL acted reasonably or unreasonably  
25 in connection with its performance of its

1 JACK E. BLUMENTHAL-9/20/11

2 duties as a program administrator?

3 A. That was outside the scope of what  
4 I've been asked to do.

5 Q. Do you have a -- do you have an  
6 opinion as to whether ALL acted consistent  
7 with the standard of professional care in  
8 connection with its responsibilities as  
9 program administrator?

10 A. Excuse me; could you please reread  
11 the first one or two sentences of that?

12 Q. I think it was one sentence, but it  
13 was just really long.

14 (Whereupon, the referred to  
15 question was read back by the  
16 Reporter.)

17 A. No, I have no opinion on that.

18 Q. Do you have an opinion as to  
19 whether ALL acted prudently or imprudently  
20 with respect to its responsibilities as a  
21 program administrator?

22 A. That's outside the scope of my  
23 engagement.

24 Q. Okay.

25 Have you been involved in or worked

1 JACK E. BLUMENTHAL-9/20/11

2 on any bond transactions in which ALL was an  
3 issuer or was otherwise involved?

4 A. Not to my knowledge.

5 Q. What is your opinion as to whether  
6 there are monies owed by the trust estate to  
7 Lloyds?

8 A. Again, please, I'm sorry; can you  
9 please repeat the question?

10 (Whereupon, the referred to  
11 question was read back by the  
12 Reporter.)

13 A. I think it's stated in my report.

14 Q. And would the -- well, let's take  
15 it this way: Is it your opinion that the  
16 trust estate owes money to Lloyds?

17 A. Yes.

18 Q. And would the amount of that money  
19 vary based on your Scenario 1 and Scenario 2  
20 in your report?

21 A. Yes.

22 Q. Do you have any opinion, other than  
23 the amounts set forth on the last couple of  
24 pages of your report, as to the amount of  
25 monies owed by the trust estate to Lloyds?

1 JACK E. BLUMENTHAL-9/20/11

2 A. No.

3 Q. Are you expressing an opinion in  
4 your report as to whether ALL or the trustee  
5 owe money to Lloyds?

6 A. Could you repeat that question?

7 Q. Does your report express an opinion  
8 as to whether ALL or the trustee owe money to  
9 Lloyds?

10 A. I'm not sure that I understand that  
11 question. Are you referring to whether Bank  
12 of New York Mellon owes money to Lloyds above  
13 and beyond what I've computed? Whether they  
14 owe the money or the trust estate owes the  
15 money?

16 Q. Yes. Can you answer that question?  
17 Are you expressing an opinion as to that?

18 A. It would be helpful if you could  
19 break apart --

20 Q. ALL and the trustee?

21 A. ALL, the trustee and the trust  
22 estate from each other because that's where  
23 we -- it could get a little confusing in terms  
24 of what the -- how I would answer those  
25 questions.

1 JACK E. BLUMENTHAL-9/20/11

2 Q. In your report, page 16, your  
3 conclusions, okay, you state, "It's my opinion  
4 that the following amounts are owed to DEPFA  
5 and Lloyds respectfully from the trust account  
6 for the bonds, as of November 5, 2009 and as  
7 of July 1, 2011."

8 Have I accurately read that?

9 A. Yes.

10 Q. Are you expressing an opinion in  
11 your report that there are amounts owed to  
12 DEPFA and Lloyds from ALL as opposed to the  
13 trust account?

14 A. The figures expressed here are what  
15 should have been paid by the trust account.  
16 Now, basically, these are the figures that are  
17 owed, in my opinion, under the different  
18 scenarios or time frames or certain periods of  
19 time with respect to what is owed to Lloyds  
20 and what is owed to DEPFA --

21 Q. Yes.

22 A. -- under these documents by the  
23 trust estate. Now, whether or not -- that's  
24 all I'm computing.

25 Q. So, you're not expressing an



1 JACK E. BLUMENTHAL-9/20/11

2 opinion that there are amounts that ALL should  
3 pay to Lloyds or DEPFA?

4 A. That is correct. That's outside  
5 the scope of my engagement.

6 Q. And would the same answer be true  
7 for the trustee; that you're not expressing an  
8 opinion that there are amounts that the  
9 trustee owes to Lloyds or DEPFA?

10 A. That is correct.

11 Q. Earlier in your report when you say  
12 "Overview Of Economic Loss Calculations" on  
13 page 3 --

14 A. Excuse me. Is this the --

15 Q. The original report, yes, yes.  
16 What do you mean by, "economic loss"?

17 A. Well, in this case, what I mean by  
18 economic loss is, given the two scenarios and  
19 given the two different points in time, it  
20 really -- it doesn't -- it doesn't incorporate  
21 what the interest on the money is that should  
22 have been paid out to either of the party.

23 When I say, "interest," I'm not  
24 talking about interest on the bond. I'm  
25 talking about interest on the fact -- interest

1 JACK E. BLUMENTHAL-9/20/11

2 associated with the payments that were not  
3 made in a timely fashion.

4 Have I made myself clear there.

5 Q. That you are not including that  
6 interest?

7 A. If any, that's correct.

8 Q. You're referring to the time value  
9 of money?

10 A. Yes, ma'am.

11 Q. So, I understand it doesn't include  
12 that. What does it include?

13 A. It includes, very simply, the  
14 amount of money -- it's the net amount -- that  
15 is to say -- if we look at it this way; what  
16 should have been paid to Lloyds and what  
17 should have been paid to DEPFA, minus what was  
18 paid to Lloyds and what was paid to DEPFA,  
19 without incorporating the concept of the time  
20 value of those amounts over time that should  
21 have been paid out or should not have been  
22 paid out.

23 Q. In your view, is economic loss  
24 equal to economic damages? Is it the same  
25 concept?

1 JACK E. BLUMENTHAL-9/20/11

2 A. Economic damages, as I understand  
3 them, incorporate the concept of legal  
4 measures of damage which is a legal -- has a  
5 legal framework that can be set apart from an  
6 economic framework. And so when we talk  
7 about -- when I talk about damages -- this is  
8 my personal understanding.

9 To me, damages incorporate the  
10 legal interpretation of the measure of damages  
11 under those circumstances and directly to the  
12 points here, I did not consider that.

13 Q. So, is it correct that you are not  
14 offering an opinion on damages suffered by  
15 either Lloyds or DEPFA?

16 MR. BARRES: Object to the form.

17 A. I don't know if I'm going to be  
18 asked to or not.

19 Q. Is it correct that you haven't been  
20 thus far asked to?

21 A. That's correct.

22 Q. As you sit here today, do you have  
23 an opinion on whether Lloyds suffered damages  
24 as distinct from how you've defined economic  
25 loss?